Supreme Court, U.S.
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No. 92-1901

In The

Supreme Court of the United States

October Term, 1992

GLENDALE MORE, JR., MICHAEL E. BURROWS, and JOHN COBURN,

Petitioners,

v.

HAROLD FARRIER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE PETITION 1

No New Issue of Federal Law Is Presented 1

CONCLUSION 4

TABLE OF AUTHORITIES

Page

CASES:

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) . . .2, 3

More v. Farrier, 984 F.2d 265 (8th Cir. 1993) 1, 2, 3

STATUTE:

Americans with Disabilities Act, 42 U.S.C. § 12101 . . .1, 2

STATEMENT OF THE CASE

Respondents have no serious disagreement with the Petitioners' statement of the case. However, the facts of the case were part of the stipulated record before the Eighth Circuit, *More v. Farrier*, 984 F.2d 269 at 270 (8th Cir. 1993), and Petitioners do not confine themselves to the record before the Eighth Circuit. The facts discussed by the Eighth Circuit adequately explain the positions of the parties and Respondents adopt those.

For example, the Petitioners indicate that the Consent Order did not provide "equality of opportunity" or "full participation." (Petition for Writ of Certiorari. pp. 8-9). However, the Court of Appeals found that the Consent Order "mandates some physical reforms and obligates ISP to provide Appellees with some privileges that are unavailable to some ISP inmates." 984 F.2d at 271. The Petitioners' Statement of the Case accurately describes those matters relevant to the narrow issue before the Court of Appeals and before this Court. The Eighth Circuit concluded that "the prison officials have provided Appellees with substantially equivalent television a short distance from their cells." 984 F.2d at 272.

REASONS FOR DENIAL OF THE PETITION

No New Issue of Federal Law Is Presented

The Petitioners challenge the Eighth Circuit's use of the rational basis standard of review under the Equal Protection Clause in a case involving physically handicapped individuals. Petitioners argue that the passage of the Americans with Disabilities Act, (42 U.S.C. § 12101, et

seq.) (ADA) requires the use of a heightened scrutiny analysis to determine whether the Equal Protection Clause has been violated. Petitioners are inmates at the Iowa State Penitentiary who, because they are wheelchair-bound, have been placed in an area of the penitentiary which is not wired for in-cell cable television like the remainder of the cellhouses. This housing assignment is necessary because no other area of the penitentiary provides unassisted access to the prison yard. In lieu of in-cell cable, the prison officials make available to these three inmates, two cable televisions in the community room between the hours of 7:00 a.m. and 10:00 p.m. daily. *More*, 984 F.2d 269, 270.

The only question before the Court of Appeals was whether this practice constitutes invidious discrimination under the Equal Protection Clause. Petitioners have never and do not now allege a violation of the ADA. The Petitioners' other claims under the Rehabilitation Act of 1973 (29 U.S.C. § 794a) and the Eighth Amendment were dismissed by the district court and not appealed. (Petition for Writ of Certiorari, Appendix, B-2).

The Court of Appeals, citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-43, 105 S.Ct. 3249, 3255-56, 87 L.Ed.2d 313 (1985), found that the rational basis standard applied and rejected the Petitioners' argument that the ADA mandated a basis to apply "heightened scrutiny." The Eighth Circuit said:

> Appellees argue that they are entitled to heightened scrutiny as a result of increased federal and state concerns over the rights of handicapped individuals. Appellees' Brief at 13-14 (citing the Americans with Disabilities Act, 42

> U.S.C. § 12101 and the Iowa Code Chapter 601A). These statutes do not, however, purport to alter the standard for constitutional equal protection claims.

More, 984 F.2d 269, 271, n. 4.

The issue presented here is no different from that presented in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-43 (1985). This Court in *Cleburne*, citing recent congressional legislation dealing with the mentally retarded, found that the existence of the "distinct legislative response both national and state, to the plight of those who are mentally retarded . . . belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443-4.

In contrast, the Petitioners here attempt to use the extensive congressional findings with respect to the handicapped to *establish* the need for heightened judicial scrutiny under the Equal Protection Clause. The passage of the ADA shows that the handicapped are not politically powerless in the sense that they have no ability to attract the attention of lawmakers. *Cleburne*, 473 U.S. at 445. The Court, in *Cleburne*, has rejected heightened scrutiny status for a similar group, the mentally retarded, when significant legislation has been passed to ease their plight and which provides a remedy for grievances.

> To withstand Equal Protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.

City of Cleburne, 473 U.S. at 446.

The issue need not be revisited in this case with respect to the physically handicapped.

CONCLUSION

Petitioners present no issue of federal law which has not been, but should be decided by this Court, nor is there a question which has been decided in a way that conflicts with applicable decisions of this Court. Supreme Ct. R. 10. The petition should be denied.

Respectfully submitted,

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